SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1096

MRS. MATTIE L. SMITH,

Appellant,

vs.

JEFFERSON COUNTY, GEORGIA, BY AND THROUGH ITS BOARD OF COMMISSIONERS OF ROADS AND REVENUES, J. E. BARROW, CLARENCE HENDERSON, AND SCHOOL DISTRICT NO. 2 OF JEFFERSON COUNTY, GEORGIA, BY AND THROUGH ITS BOARD OF TRUSTEES, F. T. MCELREATH, W. D. EVANS, S. W. OVERSTREET AND J. W. FUTRAL, AND T. H. RIVERS AS TAX COLLECTOR OF JEFFERSON COUNTY, GEORGIA, AND JAMES HUBBARD AS SHERIFF OF JEFFERSON COUNTY, GEORGIA,

Appellees

STATEMENT AS TO JURISDICTION

This was a suit brought in the Superior Court of Jefferson County, Georgia, by appellant who was a non-resident, seeking to cancel certain deeds made by the taxing authorities of that county, in which said petition appellant asserted claims under the 14th Amendment of the Constitution of the United States to the effect that her property was being taken without due process of law, and that she was denied the equal protection of law as provided in the said 14th

Amendment. For instance, in sub-paragraph (c) of paragraph 10 of her original petition she alleged that:

> "Petitioner was a non-resident of the State of Georgia at the time and did not know of said levy and sale, and that not having returned the same for taxation for 1927, under Section 92-8103 of the Code of Georgia, Annotated, the same should have been advertised for 90 days in the official gazette, if rental or hiring would not produce the taxes; the sale thereof having been advertised in the NEWS & FARMER, the official gazette of said county, only once a week for four weeks during the month of June 1928, to-wit: June 7th, 14th., 21st., and 28th., 1928; said advertisement being for sale on the first Tuesday in July, 1928, as the property of M. B. Smith, whereas, 'said Sheriff's deed recites' that the land ' "was sold on the 9th day of July, 1928 (an illegal sales day); the first Tuesday in July, 1928, having fallen on July 2;" ' and in sub-paragraph (1) of said paragraph 10 she alleges that 'the taking of petitioner's said property under said tax deed was without due process of law, and in violation of the Constitution of the United States.' "

And after the lower court had directed a verdict in favor of appellees she again urged her claim of right under the 14th Amendment of the Constitution of the United States in her motion for a new trial as will be seen by reference thereto ground 5, sub-paragraph (f):

> "Taking Movants property under said tax deeds is without due process of law, and in violation of the Constitution of the United States, embodied in Section 1-805, 'No person shall be deprived of property without due process of law' and in Section 1-815, 'Nor shall any State deprive any person . . . of property without due process of law.' "

And thereafter appellant further urged her claim to rights guaranteed under the 14th Amendment of the Con-

stitution of the United States in a motion for a rehearing before the Supreme Court of Georgia after it had rendered its decision in this case as follows:

> "Movant also respectfully insists that the Court fell into error in deciding as a matter of law that the Movant did not have her property taken away from her without due process of law in violation of the 14th Amendment of the Constitution of the United States, when it appeared from the record that Movant was a non-resident of the State of Georgia, and the undisputed facts show that this property was not advertised in accordance with the law in order to sell the property of a non-resident,—the record showing that the advertisement ran for only five weeks when the law required that it should have been advertised for a period of 90 days; and certainly to take Movant's property without selling the same according to law, would be to take it without due process of law. Moreover, the undisputed record also shows that the deed in the record shows that it was sold on an illegal sale's day, to wit, the 9th day of July, 1928, when the legal sale's day was on July 2, 1928. So it will be seen from the record as Movant insists that the sale of her property was without regard to her rights, and in fraud, and without any notice as provided by law."

Appellant, therefore, insists that there was a bona fide claim asserted under the 14th Amendment of the Constitution of the United States, which was decided against her, and that this Court has jurisdiction on this appeal by reason of that fact, and in pursuance of paragraph (b) of Section 344 of U. S. Code and Section 237 of the Judicial Code, which provides that this Court has jurisdiction "where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution."

Appellant further insists that there is a substantial Federal question involved similar to that involved in the

case of *Henry W. O'Neill* vs. *Jacob W. Leamer,* 239 U. S. 244, 60th Law Ed., wherein it was held,

> "A contention that an appropriation of land for a drainage district was essentially for a private purpose, and hence contrary to U. S. Const., 14th Amend., as amounting to a deprivation of property without due process of law, presents a Federal question which will support a writ of error from the Federal Supreme Court to a state court, where the latter court denied the right so asserted."

It is, therefore, respectfully submitted that this Court has jurisdiction of this case on appeal.

Attached hereto as Exhibit A is a copy of the decision rendered in said cause.

Respectfully submitted,

BENJ. E. PIERCE,
Attorney for Appellant.

EXHIBIT "A"

SUPREME COURT OF GEORGIA

No. 15601

SMITH

v.

JEFFERSON COUNTY et al.

Decided November 14, 1946

By the Court:

1. A deed properly executed by a sheriff pursuant to a sale under a tax execution, even if void for any reason, is such color of title as will support prescription by seven years' adverse possession.

2. The judgment under review was demanded by the pleadings and the evidence, and the assignments of error do not require the grant of a new trial.

On July 11, 1944, Mrs. Mattie L. Smith filed her equitable petition against Jefferson County, School District No. 2 of such county; T. H. Rivers, tax collector, and James Hubbard, sheriff, both of Jefferson County. She alleged: On June 4, 1928, she was the owner of two adjoining, described lots in the City of Wadley (Jefferson County) containing one and one-half acres, of the value of $4000. On that date a deputy sheriff of Jefferson County, without any effort to subdivide or sell a portion of the one-and-one-half acre tract, levied a tax execution thereon against M. B. Salter, issued by the tax collector of Jefferson County, in the sum of $22.20, for State, county and school taxes for the year 1927. The tax execution, entry of levy, and disbursement of funds received at the sale, as shown by the entry of the execution, are set out in full. The levy, as alleged, was grossly excessive, fraudulent, and void. On July 9, 1928, D. C. Thomas, sheriff, executed a deed to Jefferson County. The deed, which is set out in full, recites: the levy of an execution issued against M. B. Smith for 1927 State, county, and school taxes, by M. A. Evans, tax collector; advertisement

in the News & Farmer, the newspaper in the county in which sheriff's advertisements are published; the sheriff's proceeding on July 9, the same being a day for the sale of the property according to law; the exposure of the property for sale before the courthouse door, and its being knocked off to Jefferson County for $40.

The plaintiff alleged that the deed to Jefferson County is void because: (a) the levy was excessive and void; (b) the execution issued against M. B. Salter, who was never the owner of the land; (c) the plaintiff was a non-resident, and the property should have been advertised for ninety days, under the Code, § 92-8103; (d) the notice required by the Code, §§ 92-6212 and 92-6213, had not been given her; (e) the advertisement did not set forth the amount of the tax assessed; (f) the property was advertised as the property of M. B. Smith; (g) the plaintiff's taxes on the property were paid; (h) the property could have been rented out and taxes, if due, paid from the rents; (i) the execution failed to state that the property was unreturned; (j) the property was not pointed out by the plaintiff; (k) no notice of a tax assessment for the years 1927 and 1928 was ever given the plaintiff; (l) the taking of the plaintiff's property under such tax deed was without due process of law and in violation of the constitution of the United States (Code, §§ 1-805, 1-815).

The plaintiff charged: That a warrant on the treasurer for costs in connection with the sale has not been drawn as required. On January 1, 1930, a deed by the commissioners of roads and revenues of Jefferson County, purporting to convey the lands to School District No. 2 of the county, was made and later recorded. "On the first Wednesday in November, 1929, when petitioner's husband learned of a purported sale of her land by said sheriff, he, with Judge W. L. Phillips, an attorney, appeared before said board of commissioners and offered to pay and tendered all taxes, interests, costs or other lawful charges against said one-and-one-half-acre tract, and to redeem said land, which payment they refused to accept." The deed to School District No. 2 is void because: (a) the county had no title to convey; (b) no resolution was passed by the board authorizing the execution of the deed; (c) no commissioner

was appointed to sell the land. The tract was vacant land, and immediately after her discovery of the two deeds she, through her attorney, had a fence erected around the land. Her attorney was arrested and the fence torn down. The deeds are a cloud on the plaintiff's title. The defendant trustees, by telling prospective lessees that they owned the lands, have prevented her from leasing them since January 1, 1930, causing her to lose $100 per annum since that time. In addition to loss of rental, the trustees have continuously trespassed upon her lands, and she is entitled to damages, including punitive damages, of $5000, certain expenses of $650, and attorney's fees of $490. The plaintiff has paid all taxes assessed against her; she offers and has offered to do equity, and renews such offer to pay all legitimate taxes due as fixed by the court. She prayed that the defendants be enjoined and restrained from changing the status of the property, that the deeds to Jefferson County and the School District be declared void and cancelled, for process, and for the recovery of damages alleged.

The defendants filed their answer, denying the material allegations of the petition, but admitting the execution of the deed to the trustees of school district No. 2, as alleged, and that certain named persons were officers of the defendant county and district. The defendants filed an amendment to their answer, alleging that the school district, in order to protect its title, had to pay to the City of Wadley a paving assessment of $836.53, bearing interest from July 1, 1927, at 7 per cent per annum. The plaintiff demurred to the amendment. Her demurrer was overruled, she excepted pendente lite, and error is assigned in the bill of exceptions on the pendente lite exceptions.

On the trial of the case, after evidence had been introduced, the court directed a verdict for the defendants. The plaintiff filed a motion for new trial, which, after amendment, was overruled. Error is assigned on the judgment overruling the motion for new trial as amended.

The brief of the oral and documentary evidence covers 57 pages. Much of it was not relevant to the issues made. The evidence showed that the plaintiff, Mrs. Smith, had acquired the full title to one of the lots (included in the deed made by the sheriff as a result of the tax sale) in 1920,

and that she had acquired title to the other lot in 1925. She never at any time returned either lot for taxation, and never received any notice of assessment by the tax receiver. She heard a rumor in October, 1929, that certain persons at Wadley had obtained her lots for $22.20 taxes. She had been renting the lots for $75 annual rental, and made a contract for $100 for the year 1930, but the lessee advised her by letter that he could not take possession according to the agreement because officials of the county advised him that the property was owned by the county.

The tax deed made by the sheriff to Jefferson County was introduced in evidence, as was the fi. fa. described in the plaintiff's petition. The tax digest was introduced, showing that the plaintiff did not make a tax return for the year 1927. The defendants introduced the digest, showing that M. B. Smith made tax returns beginning with the year 1920 and continuing through the year 1934. Smith's returns in the 83rd district (City of Wadley) for the years 1926 through 1929 were for $600, being the amount of the assessment against the land claimed by the plaintiff. A copy of the official advertisement in the News & Farmer (official organ of Jefferson County) showed that the advertisement appeared in four issues immediately preceding the first Tuesday in July (July 2). The deed from Jefferson County to School District No. 2 was introduced.

There was much evidence for the defendant school district showing that the lots had been graded and used as a playground for the school children after it was acquired by the district. The plaintiff testified that she did not know of the sale of her lots until August, 1942. This testimony was contrary to the allegations of her petition that she had notice from a person to whom she had leased the lots in 1930, and the further allegation that her husband learned of the sale and went before the county board of commissioners to redeem the property in 1929. Both the plaintiff and her husband contended that her taxes for the year 1927 were paid to D. C. Thomas, the sheriff, by check. Records and testimony were introduced by the defendant to show that there was no record of Thomas (since deceased) having received such a check. Smith's testimony that the check was exhibited to the county commissioners was disputed

by persons who were members of the board at the time of the meeting.

The defendants offered in evidence minutes of the county commissioners' meeting in January, 1930, showing a sale of the Smith property to School District No. 2, and also offered evidence of the assessment made against M. B. Smith for paving done by the City of Wadley, and the acts authorizing such paving. The defendants introduced in evidence a judgment rendered in the District Court of the United States on October 11, 1943, in an action by the plaintiff against the same defendants and involving the same property, wherein it is recited in part as follows: "It appears that Mr. M. B. Smith, the husband of the petitioner, and her agent in handling this matter from the beginning, saw some lawyers about recovering the property from the authorities of Jefferson County more than ten or twelve years ago, and that one of these lawyers informed him that he had waited too late and was barred by the statute of limitations."

HEAD, *Justice:*

(After stating the foregoing facts.)

1. "Where land is sold under an execution based upon a void judgment, no title passes. But the purchaser at such sale holding the sheriff's deed has color of title; and if in good faith he enters into possession and holds the land adversely for seven years, he has a good title by prescription." Rogers v. Smith, 146 Ga. 373. The same rule applies to a tax sale by a sheriff. In the present case the tax collector testified that the records in his office showed that an execution for the year 1927 issued against M. B. Smith, and that the record contained a notation that the property had been sold to the county. The plaintiff contends that the execution accompanying the tax deed on the deed records was issued against M. B. Salter. There was evidence which would have authorized the finding that the name on the execution was erroneously entered at the time of recording. But even should it be assumed that the plaintiff's contention was correct, and that such execution amounted to no execution at all, it was held in Peeples v.

Wilson, 140 Ga. 610, that: "A sheriff's deed to land, executed to one who purchases at a tax sale, though not accompanied by the tax fi. fa. under which the land was sold, is good as color of title." (See also authorities cited.) And in Wood v. Wilson, 145 Ga. 259, with reference to a sale by a sheriff under a tax execution, it was held: "Though the sheriff's deed be void as title, it is good as color of title, and prescription by seven-years' adverse possession of the land may be predicated upon it, if the defendant's possession did not originate in fraud."

It appears without dispute that the county board of commissioners of roads and revenues, after the time had passed for the plaintiff to redeem the property, conveyed it to the school district in 1930. Was the possession by the school authorities adverse to the plaintiff for the more than fifteen years after the execution of such deed? The allegations of the plaintiff's petition conclusively establish such possession. She alleges in one instance that "defendant trustees telling prospective lessees that they were the owners of said property . . . prevented petitioner from leasing same since Jan. 1, 1930, thereby causing her a loss of over $100 per annum since that time;" and in another paragraph she alleges that "the trustees . . . have willfully and wantonly and continuously trespassed upon said land of petitioner, and been in the possession thereof, except a short time in 1934, a short time in 1937, and a short time in 1942, when plaintiff was in possession of same, since January 1, 1930," for which she asks damages. Since the plaintiff does not undertake to state any fact or circumstance to show what her short possession in 1934, 1937, and 1942 consisted of, such allegation is a mere conclusion, and does not overcome her allegation that the trustees have been continuously in possession since 1930. Under the averments of her petition, the only time that she did anything to evidence possession was in 1942, when she attempted to have a fence constructed around the lots, and then she alleges that the person in charge of such work was arrested and the fence torn down at the instance of claimants to the property. Certainly, under the allegations of the petition, the plaintiff fails to show any acts of possession since 1930. The undisputed testimony for the defendants shows improve-

ment and grading of the property, and use by the teachers, children, and school authorities since 1930.

"Actual possession of lands is evidenced by inclosure, cultivation, or any use and occupation thereof which is so notorious as to attract the attention of every adverse claimant, and so exclusive as to prevent actual occupation by another." Code, § 85-403. Under the allegations of the petition, the plaintiff's attention was attracted to the use of the lands by the school authorities in 1930, and her only attempt to evidence possession was resisted with sufficient force to prevent her occupation of the lands, even temporarily. It follows that the school authorities at least acquired title by prescription under color of title, unless possession was acquired by fraud. " 'The fraud meant by the Code, in declaring that possession in order to be the foundation of prescription must not originate therein, is actual, moral fraud, a wrongful act, and not an act which the law denominates a fraud regardless of the bona fides of the parties.' " Connell v. Culpepper, 111 Ga. 805. Did the possession of the school authorities originate in fraud? No such wrongful act as to the school authorities is alleged, nor is there any evidence of any such acts in the record.

By holding that the school authorities acquired title by prescription under color of title prior to the filing of the present action, we do not intend to infer that the deed made by the sheriff to Jefferson County is necessarily void. Under decisions of this court in State v. Hancock, 79 Ga. 801, Barnes v. Lewis, 98 Ga. 559, and Dawson v. Dawson, 106 Ga. 45, a contrary ruling would appear to be authorized. The assumption that the sheriff's deed was void, however, is the most favorable position possible to the plaintiff, and under it she can not recover, the defendants having acquired title by prescription under their deed.

2. The exceptions pendente lite, which assign error on the allowance of an amendment by the defendants, pleading a paving assessment against M. B. Smith due the City of Wadley, and alleged to have been paid by the defendants to protect their title, do not show any reversible error. The title which the defendant school district acquired under their deed and by prescription was in no way dependent

on such paving assessment, if due and paid as alleged. The court did not err in allowing the amendment, which might have been germane as a claim for equitable setoff, had the plaintiff recovered in her action for the property.

The Code, § 32-909, providing that county boards of education shall have power to control the property of school districts, necessarily means that such districts may receive property for such county boards of education. The contention that local trustees could not be the owners of the property in question is therefore without merit.

Grounds of the motion for new trial as amended, contending that the court should have charged the jury certain principles of law, and that it was error to direct a verdict for the defendants for certain reasons assigned, are controlled, adversely to the plaintiff's contentions, by the rulings heretofore stated sustaining such verdict.

Judgment affirmed. All the Justices concur.

Filed in office. Jan. 24, 1947. Henry H. Cobb, D. C. S. C. Ga.

(9379)